ALGEMENE BANK NEDERLAND N.V.

v.

TEOH GUAN CHIANG & ANOR.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[SUIT NO. 24-632-1989]
12 JUNE 1989

CIVIL PROCEDURE: *Order 14 RHC 1980 application - O. 15 r. 5(2) - counterclaim ordered to be tried separately - Order 14 r. 3(2) - Question of stay of execution until the trial of the counterclaim.*

In an application for summary judgment under O. 14 Rules of the High Court 1980 the plaintiff was granted final judgment by the Senior Assistant Registrar who also ordered that the defendants counterclaim be tried separately.

The issue was whether the Senior Assistant Registrar was correct in ordering a separate trial of the defendant's counterclaim under O. 15 r. 5(2) of the Rules of the High Court 1980 instead of granting a stay of execution until the trial of the counterclaim under O. 14 r. 3(2).

Held:
In an application for summary judgment under O. 14 Rules of the High Court 1980, where there is clearly no defence to the plaintiff's claim but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should be for judgment for the plaintiff with costs, with a stay of execution until the trial of counterclaim.

[Appeal allowed. Costs to be paid by the plaintiff.]

Cases referred to:
Morgan & Sdn. Ltd. v. S. Martin Johnson & Co. [1949] 1 KB 107
Anglo Italian Bank v. Wells & Davies [1878] 38 LT 197
Sheppards & Co. v. Wilkinson & Jarsis [1889] 6 TLR 13

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 3(2), O. 15 r. 5(2)

For the defendants/appellants - Foong Kai Choong; M/s. Mahinder Singh Dulku & Co.
For the plaintiff/respondent - Lim Chien Cheng; M/s. Presgrave & Matthews

JUDGMENT

Mohamed Dzaiddin J:

Decision on encl. 17

The sole issue for my decision in this appeal is whether the learned Penolong Kanan Pendaftar was correct in ordering a separate trial of the defendant's counterclaim in this action.

The plaintiff's claim in this action is for recovery of the sum of RM65,453.04 being principal and interest due for monies advanced to the defendants under their overdraft account and bills delivered under trust receipts. The defendants filed their defence and counterclaim, alleging in the latter that the plaintiff was in breach of contract whereby they had suffered loss and damage. In an application for summary judgment under O. 14 Rules of the High

Court, the plaintiff was granted final judgment for the aforesaid sum with interest by the Penolong Kanan Pendafter who also ordered that the defendant's counterclaim in this action be tried separately.

Having considered the pleadings and the submission of Counsel, in my judgment, the learned Penolong Kanan Pendaftar was correct in the exercise of his powers under O. 15 r. 5(2) Rules of the High Court to order a separate trial of the counterclaim. Rule 5(2) reads as follows:

> If it appears on the application of any party against whom a counterclaim is made that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient.

However, in the light of the plaintiff's application under O. 14 where judgment on the plaintiff's claim was given by him, the effect of the defendant's defence and counterclaim to the summary judgment becomes relevant and important in this appeal. This is because O. 14 r. 3(2) gives the Court power to stay execution of any judgment given under this rule, subject to such conditions as may be just, until after the trial of any counterclaim made or raised by the defendant in the action. It is conceded by Encik Foong, for the defendants, that his client have not appealed against the O. 14 judgment. But, he maintained that as the defendant's counterclaim arose of the same subject matter of the action and connected with the defence filed, it should not be tried separately. Encik C.C. Lim, on the other hand, seemed to lay stress on O. 15 r. 5(2). Thus, it is quite clear to me that the learned Penolong Kanan Pendafter has failed to consider the effect of O. 14 r. 3(2).

The commentaries in the 1985 *White Book* under summary judgment (p. 141) states that where in the circumstances of the case a defendant has set up a *bona fide* counterclaim arising out of the same subject-matter of the action the Court should grant him an unconditional leave to defend, even if the defendant admits the whole or part of the claim [*Morgan & Sdn. Ltd. v. S. Martin Johnson & Co.* [1949] 1 KB 107. (where whole claim admitted)]

It further states that the mere fact that the defendant has a counterclaim does not necessarily entitle him to leave to defend (*Anglo Italian Bank v. Wells & Davies* [1878] 38 LT 197.) Where therefore there is clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to the trouble and expenses of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment for the plaintiff on the claim with costs, which a stay of execution until the trial of the counterclaim or pending further order (*Sheppards & Co. v. Wilkinson & Jarvis* [1889] 6 TLR 13).

Based on the above passages in 1985 *White Book*, I allow this appeal by ordering that the counterclaim be tried in this action and that the execution of the plaintiff's judgment by stayed until the trial of the counterclaim with further order that the costs of this appeal be paid by the plaintiff to the defendants. I also make an order for an early trial of this counterclaim.

Also found at [1989] 2 CLJ 789